FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 4 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

GEORGE CLINTON, JR.,
ALGER A. WILLIAMS,
Counsel for Petitioner.

CHARLES H. KENDALL,
Of Counsel.

INDEX.

Subject Index.

	Page
Opinions	1
Jurisdiction	2
Facts	2
Questions presented	3
Argument:	
Summary	4
Point I—This is an action at law between contracting parties	4
Point II—The action was commenced by service of the summons	6
Point III—Respondent waived the defense of the statute of limitations	10
Point IV—The defect in petitioner's initial process, if any, was waived by respondent	14
Point V—The respondent is estopped to deny that the action was commenced by service of the summons	18
Conclusion	19

Appendix.

28 U. S. C. A., Secs. 762, 763, 765	20

Cases Cited.

Atlantic Coast Line Railway v. *Burnette*, 239 U. S. 199, 60 L. Ed. 226	12, 15
Ayers v. *Watson*, 113 U. S. 594	12
Bennett Day Importing Company v. *United States*, 8 F. (2d) 83 (S. D. N. Y.)	10
Bentley v. *Reid*, 133 Fed. 698 (C. C. A. 5th)	16
Burnet v. *Desmornes*, 226 U. S. 145, 57 L. Ed. 159	11, 13
Cassarello v. *United States*, 265 Fed. 326	14
Central Vermont Railway v. *White*, 238 U. S. 507, 59 L. Ed. 1433	12
Cooper v. *Reynolds*, 10 Wall. 308, 19 L. Ed. 931	13

Page

Everett Railway Company v. *United States*, 236 Fed. 806 ..... 14, 17
Farrar & Brown v. *United States*, 3 Pet. 459, 7 L. Ed. 741 ..... 14, 15
Jenkins v. *United States*, 86 F. (2d) 123 (C. C. A. 5th) 12
Johnson v. *United States*, 68 F. (2d) 588 (C. C. A. 5th) 16
Law v. *United States*, 266 U. S. 494 6
Lynch v. *United States*, 292 U. S. 571, 78 L. Ed. 1434 ..... 4, 12
Mill Creek Navigation & R. R. Co. v. *United States*, 246 Fed. 1013, aff'd 251 U. S. 539, 64 L. Ed. 404 10
Miller v. *United States*, 13 Fed. Supp. 684 (W. D. N. Y.) 10, 16
Munro v. *United States*, 10 Fed. Sup. 412 1
Munro v. *United States*, 89 F. (2d) 614 2
National Casket Company v. *United States*, 263 Fed. 246 14
Perry v. *United States*, 294 U. S. 330, 79 L. Ed. 912 12
Provident Trust Company v. *United States*, 17 Fed. Supp. 849 (E. D. Pa.) 10
Reid Wrecking Company v. *United States*, 202 Fed. 314 14
Rock Island R. R. Co. v. *United States*, 254 U. S. 141, 143 19
Romano v. *Metropolitan Life Ins. Co.*, 271 N. Y. 288 19
Thames & Mersey Ins. Co. v. *United States*, 237 U. S. 19 ..... 14, 17
Tucker v. *Alexander*, 275 U. S. 228 17
United States v. *Ellison*, 74 F. (2d) 864—Certiorari denied, 295 U. S. 750 13
United States v. *Hvoslef*, 237 U. S. 1 ..... 14, 17
United States v. *Larkin*, 208 U. S. 333, 52 L. Ed. 517 16
United States v. *N. Y. & Ohio Steamship Co.*, 216 Fed. 61 (C. C. A. 2d) 14, 17
United States v. *Swan*, 65 Fed. 647, 13 C. C. A. 77 13
Whalen Paper & Pulp Mill, Ltd., v. *Davis*, 288 Fed. 438 ..... 14, 15

Statutes Cited.

	Page
38 U. S. C. A., Sec. 445 (World War Veterans' Act)	5
28 U. S. C. A., Sec. 762 (Tucker Act)	6
28 U. S. C. A., Sec. 724 (Conformity Act)	7
New York Civil Practice Act, Sec. 218	7
Rule 1, Common Law Rules of the District Court of the United States for the Western District of New York	7
28 U. S. C. A., Sec. 761 (Tucker Act)	8
28 U. S. C. A., Secs. 762, 763, 765 (Tucker Act)	5, 6, 8, 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Opinions.

The opinion of Hon. Harlan W. Rippey, District Judge, accompanying his denial of the respondent's motion before trial for a dismissal of the complaint, is reported in 10 Fed. Supp. at page 412, and appears in the record at page 19.

No opinion was handed down by the Hon. John Knight, District Judge, before whom the cause was tried.

The opinion of the Circuit Court of Appeals, Judge Swan writing, Judges L. Hand and A. Hand, concurring, in con-

nection with the reversal of the District Court's judgment for petitioner, is reported in 89 F. (2d) at page 614 and appears at page 29 of the record.

Jurisdiction.

The case is before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted October 11, 1937.

Facts.

This is an action upon a policy of war risk insurance under which the petitioner claims indemnity for total and permanent disability. The judgment of the United States District Court for the Western District of New York, in favor of petitioner (R. 22), has been reversed by the United States Circuit Court of Appeals for the Second Circuit (R. 34), upon the ground that this action was not brought within the time limited therefor by Act of Congress (R. 29-33).

It is not disputed that this action should have been commenced on or before July 1, 1933. On March 16, 1933, petitioner caused a summons to be issued by the Clerk of the District Court at Buffalo, which summons was entitled in this action and, on the same day, was served upon the United States Attorney at Buffalo and the United States Attorney General, Department of Justice, Washington, D. C. (R. 4, 5). This practice was adopted upon the specific instructions of an Assistant United States Attorney at Buffalo (R. 14). Thereafter the respondent failed to appear in the action and, upon inquiry, counsel for the petitioner was assured that due service of the complaint would be admitted by the respondent (R. 15). The complaint herein was served July 26, 1933, and an admission of due service was endorsed thereon by the United States Attorney at Buffalo (R. 7). Thereafter, a copy of the complaint was

mailed to the United States Attorney General at Washington (R. 11, 16).

On February 16, 1934, respondent served an answer denying the allegations of petitioner's complaint, and setting up no affirmative defenses (R. 7). On November 16, 1934, respondent moved to dismiss the complaint upon the ground that the action was barred by the Statute of Limitations (R. 8). The motion was denied by the Hon. Harlan W. Rippey, one of the Judges of the United States District Court for the Western District of New York (Opinion, R. 19, Order, R. 21). The action was brought to trial before the Hon. John Knight, Judge of the District Court, and a jury, on April 9, 1936 (R. 13). Respondent's motions upon the trial for dismissal of the complaint upon the ground that suit was not commenced within the time limited therefor were denied (R. 19), and a judgment in favor of the petitioner, based upon the verdict of the jury, was entered July 17, 1936 (R. 22).

The respondent appealed from the judgment of the District Court to the Circuit Court of Appeals for the Second Circuit, and, on April 19, 1937, the Court of Appeals reversed the judgment below (R. 34), holding that the action was not timely brought and that the delay was not waived by the respondent (R. 29-33). Certiorari was granted by this Court on October 11, 1937 (R. 35).

Questions Presented.

1. Whether an action against the United States upon a policy of war risk insurance can be commenced in the United States District Court for the Western District of New York by the service of a summons.

2. Whether the irregularities in petitioner's procedure or his delay in bringing suit have been waived by the respondent.

ARGUMENT.

Summary.

In issuing to the petitioner the policy of insurance upon which this action was based, the United States acted not in a sovereign governmental capacity, but as a business corporation, creating ordinary contractual rights and liabilities.

The Congress, in authorizing suits upon war risk policies, did not attempt to prescribe every procedural incident in connection therewith, or intend to supplant local practice in those matters not specifically controlled by the statute.

The Tucker Act, which includes every Congressional direction as to procedure in such a case as this, does not specify how such an action shall be commenced, and by necessary inference leaves that and other procedural details to be determined either by the rules of the court of original jurisdiction or the practice of the State in which the action is brought, both of which sources of authority approve the method adopted by petitioner.

The service of the summons in an attempt to commence this action was, at most, a procedural defect which could be, and was, waived by the attorney for the respondent.

The doctrine of sovereign immunity should not be so applied as to deprive petitioner of substantial rights under his contract with the respondent.

Point I.

This is an Action at Law Between Contracting Parties.

The attention of the Court is respectfully directed first to the following excerpt from its opinion, written by Justice Brandeis, in the case of *Lynch* v. *United States*, 292 U. S. 571:

> "War Risk Insurance, while resembling in benevolent purpose pensions, compensation, allowances, hos-

pital and other privileges accorded to former members of the army and navy or their dependents, differs from them fundamentally in legal incidents. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. * * * On the other hand, War Risk policies being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder.

When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. * * * But while the statutes granting gratuities contain no specific provision for suits against the United States, Congress, as if to emphasize the contractual obligation assumed by the United States when issuing War Risk policies, conferred upon beneficiaries substantially the same legal remedy which beneficiaries enjoy under policies issued by private corporations."

The Act by which Congress authorized suit against the United States on War Risk claims is 38 U. S. C. A., Sec. 445 (World War Veterans' Act), and reads, in part, as follows:

"In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28,

and section 765 of Title 28 so far as applicable. * * *

"No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date. * * * Provided, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: Provided further, That this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim sued upon and the denial of said claim by the Administrator of Veterans' Affairs. * * *

"If suit is seasonably begun and fails for defect in process, or for other reasons not affecting the merits, a new cause, if one lies, may be brought within a year though the period of limitations has elapsed."

The right to entertain this action, so granted by Congress to the District Courts, has been concisely described by this Court in these words:

"The jurisdiction possessed was that to be exercised in accordance with the laws governing the usual procedure of the Court in actions at law for money compensation."

Law v. *United States*, 266 U. S. 494.

This concept of the instant case as an action at law to enforce a promise based upon a valuable consideration, is extremely important to the determination of both the questions before the Court.

Point II.

The Action Was Commenced by Service of the Summons.

The procedural guide prescribed by the Congress is found in the Tucker Act, the pertinent portion of which (28 U. S. C. A., Sec. 762), reads as follows:

"Petition in suit against United States. The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

The Conformity Act (28 U. S. C. A., Sec. 724) provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

The New York Civil Practice Act (Sec. 218) provides:

"A civil action is commenced by the service of a summons, * * *."

The Common Law Rules of the United States District Court for the Western District of New York (Rule 1) provide:

"Process.—A summons substantially in the form prescribed and ordered by the law and practice now or hereafter regulating the Supreme Court of the State of New York shall constitute the proper process in all suits in common law to require the defendant to appear and answer the complaint."

The petitioner respectfully submits that the quoted provisions are entirely consistent. In fact, it is difficult to

see how a petition may be served "in any suit brought" if such suit is not brought until the petition has been served. Certainly if Congress intended to prescribe a method for the commencement of suit in the above excerpt from the Tucker Act, its choice of phraseology was unfortunate, if not inadequate.

Nevertheless, it has been the contention of the respondent that the Tucker Act expresses a complete and exclusive method of prosecuting an action against the United States. If the wording of Section 762 is not in itself a sufficient refutation of that contention, reference may be had to Section 761, which, while not mentioned in the World War Veterans' Act, was enacted at the same time as Section 762 and indicates the intent of the legislature:

> "Proceedings in suits against United States. The course of procedure for the district courts * * * in so far as applicable and not inconsistent with Sections 762 to 765 * * * shall be in accordance with the established rules of said respective courts, * * *."

Further, the Veterans' Act itself modifies its reference to the Tucker Act by the word "so far as applicable". Reference to local practice must be had to determine the innumerable procedural questions which arise in the prosecution of a law suit. It cannot, then, be said that the Conformity Act has no application to actions against the United States. Quite on the contrary, practice in such actions is controlled by the Conformity Act, *i. e.*, the rules of the District Courts adopted pursuant to the Act, except in those particulars as to which the Congress has made inconsistent provision.

In an action at law in any jurisdiction of the United States, the plaintiff must convey to his adversary, by "complaint" or "petition" or other means, the gravamen of his acts, couched in phrases and reciting details which vary

in formality and prolixity with the particular jurisdiction involved. At some time thereafter it becomes the duty of the defendant to give notice of his defense, if any, to the claimant. The Tucker Act provides that in a suit against the United States, a verified petition setting forth the full name and residence of the plaintiff, the nature of his claim, the amount of his demand and a succinct statement of facts shall be filed with the clerk of court (Sec. 762) and served upon the District Attorney and the Attorney General, after which the District Attorney shall have sixty days to file the Government's plea, answer or demurrer (Sec. 763).

It is submitted that the Tucker Act determines the form and substance of the complaint to be served in such an action as this, the persons upon whom it shall be served and with whom filed, the time within which an answer shall be filed and sets certain limits upon default judgments. (Section 765 deals with appeals from judgments against the United States.) No more can be gleaned from the Act except by "interpretation" and "construction", processes appropriate enough when applied to a statutory scheme intended to be comprehensive, but utterly out of place when the legislation involved takes the form of exceptions to a general rule.

The Tucker Act, then, does not prescribe how an action against the United States shall be commenced, and it follows that the instant action was brought when petitioner served the summons herein, in accord with New York practice and the rules of the District Court.

It is no answer to this contention to say that the New York Civil Practice Act does not specify how an action against the United States shall be commenced. The Civil Practice Act, like other codes of procedure, classifies civil actions as "at law" and "in equity", and not by the per-

son of the defendant. The District Courts are not rendered helpless by the fact that Congress did not say how juries should be empanelled, witnesses sworn, judgments entered in suits against the United States. Local practice is, of course, invoked by analogy.

The case of *Mill Creek Navigation and Railroad Company* v. *United States*, 246 Fed. 1013, affirmed 251 U. S. 539, 64 L. Ed. 404, which originated in the Eastern District of Pennsylvania, involved a claim for refund of taxes illegally collected. The practice in the action was controlled by the Tucker Act. A summons was served in accord with local practice, and shortly thereafter a petition conforming to the requirements of the Tucker Act was served and filed. In the interim, however, the statute of limitations ran against the claim, and one of the questions before this Court was presented. Judge Dickinson in a closely reasoned opinion, came to the conclusion that the action was brought when the summons was served, finding that the provisions of the Tucker Act were consistent with the usual practice of the District Court. The affirmance of that decision by this Court will be considered below. It is sufficient at this point to note that jurisdiction of both subject matter and parties was acquired in the *Mill Creek* case in the same manner adopted by petitioner in the instant case.

A like conclusion was reached in *Bennett Bay Importing Company* v. *United States*, 8 F. (2d) 83, (S. D. N. Y.), *Miller* v. *United States*, 13 Fed. Supp. 684 (W. D. N. Y.) and in *Provident Trust Company* v. *United States*, 17 Fed. Supp. 849 (E. D. Pa.).

Point III.

Respondent Waived the Defense of the Statute of Limitations.

On the entire issue of waiver in this case, reference is intended to the following circumstances:

(a) Petitioner's summons was served some three months before the statute of limitations ran against his claim.

(b) The respondent did not move against the summons herein during the period within which a new action might have been brought by the petitioner, nor until more than a year after service of the complaint.

(c) Petitioner's attorney was orally assured by a judicial officer of the respondent that the practice adopted by petitioner was proper and sufficient to give the District Court jurisdiction.

(d) The respondent, by its attorney, admitted due service of the complaint.

(e) Respondent's answer, served more than six months after the complaint, and almost a year after the summons, consisted solely of a general denial of the allegations of petitioner's complaint.

It has not been disputed by respondent that the statute of limitations is, in general, a defense to be affirmatively pleaded in actions at law. That general rule has been recognized by this Court (*Burnet* v. *Desmornes,* 226 U. S. 145). Respondent maintains, however, that the general rule does not apply when the United States is sued.

The distinction sought by respondent seems to be based upon the theory that the expiration of the time within which suit might be brought operated to destroy the petitioner's substantive rights, or upon the theory that the District Court's jurisdiction over the subject matter of this suit lapsed when the bar of the statute fell, or upon the theory that judicial officers of a sovereign government lack authority to waive a defense belonging to the government. It is submitted that no other justification for the distinction can be postulated.

A time limitation upon suit, ordinarily a remedial provision, may be made an element of substantive right if the statute which creates the right conditions it upon timely enforcement (*Central Vermont Railway* v. *White,* 238 U. S. 507, 59 L. Ed. 1433; *Atlantic Coast Line Railway* v. *Burnette,* 239 U. S. 199, 60 L. Ed. 226), but this petitioner's claim is based upon a contract distinct from and in nowise dependent upon Section 19 of the World War Veterans' Act (38 U. S. C. A., Sec. 445, *supra*). The statute granted a remedy to petitioner, it did not create his rights.

> "The difference between withdrawing the remedy of court enforcement of a claim against the United States and destroying the whole foundation to the claim is clearly recognized in *Lynch* v. *United States,* 292 U. S. 571, 78 L. Ed. 1434, and *Perry* v. *United States,* 294 U. S. 330, 79 L. Ed. 912."
>
> *Jenkins* v. *United States,* 86 F. (2d) 123 (C. C. A. 5th).

The Circuit Court of Appeals, in its opinion below, reached the conclusion that the time limitation here involved is a condition upon the jurisdiction of the District Court. That finding is at variance with highly persuasive authority.

> "In some of the older cases the word jurisdiction is often used somewhat loosely, and no doubt cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the Court. We do not so regard it."
>
> *Ayers* v. *Watson,* 113 U. S. 594.

> "It is urged that the words of both statutes (setting time limitations upon suit) are jurisdictional and constitute a condition precedent. * * * Whether prescription goes only to the remedy or extinguishes the right,

it affects the jurisdiction no more than any other defense."

Burnet v. *Desmornes*, 226 U. S. 145, 57 L. Ed. 159.

In *United States* v. *Ellison*, 74 F. (2d) 864, certiorari denied 295 U. S. 750, it was held that the objection that suit was not timely instituted could not be raised by the Government for the first time on appeal. Obviously the case is distinguished from the one at bar, for here the Government did raise the question in the court below. But if the statute of limitations operates to deprive the court of jurisdiction of the subject matter, no period of acquiescence could cure the defect. No series of appeals, no failure to object, could operate to give the original court jurisdiction of the subject matter if such jurisdiction was originally lacking.

Further consideration of the *Mill Creek* case is important in this connection. The appeal from the District Court to this Court in that case presented squarely the issue of the lower court's jurisdiction. Such a review is directed to "initial questions of the jurisdiction of a United States District or Circuit court, whether in law or equity, over the subject matter and parties" (Taft, J., in *United States* v. *Swan*, 65 Fed. 647, 13 C. C. A. 77). The affirmance of the lower court's decision was therefore directly contrary to the Court of Appeal's conclusion in the instant case, in so far as that conclusion was based upon the lack of jurisdiction of the District Court.

> "By jurisdiction over the subject matter is meant the nature of the cause or action and the relief sought; and this is conferred by the sovereign authority which organized the Court, and it is to be sought for in the general nature of its powers, or in authority specially conferred."
>
> *Cooper* v. *Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

Authority on the part of the United States District Attorney to waive the defense of the statute of limitations was

denied by the court below upon the ground that the statute conditioned the court's jurisdiction, and it might logically be assumed that if the time limitation is not, in truth, jurisdictional, a different conclusion should be reached. The doctrine of waiver has been thought to be applicable against the United States.

Farrar & Brown v. *United States,* 3 Pet. 459, 7 L. Ed. 741;
United States v. *New York & Ohio Steamship Co.,* 216 Fed. 61 (C. C. A. 2d);
United States v. *Hvoslef,* 237 U. S. 1;
Thames & Mersey Ins. Co. v. *United States,* 237 U. S. 19;
Everett Railway Co. v. *United States,* 236 Fed. 806.

Point IV.

The Defect in Petitioner's Initial Process, if Any, Was Waived by Respondent.

The summons in this case was issued by the District Court and served upon the District Attorney and the Attorney General before the time limitation upon suit had expired. It does not appear, from its opinion, that the court below attached any signification to that circumstance. The petitioner respectfully urges that his *bona fide* attempt to commence his action in good time distinguishes this case from the authorities upon which the Court of Appeals relied.

The provisions of the Tucker Act are purely procedural in nature; the Congress so described them in the World War Veterans' Act (38 U. S. C. A., Sec. 445, *supra*). If petitioner failed to satisfy the requirements of the Tucker Act, there existed a defect in process to which respondent was entitled to take appropriate objection. The cases of *Cassarello* v. *United States,* 265 Fed. 326, *National Casket Co.* v. *United States,* 263 Fed. 246, *Reid Wrecking Co.* v. *United States,* 202 Fed. 314, and *Whalen Paper & Pulp Mill,*

Ltd. v. *Davis,* 288 Fed. 438, go no further than to hold that such an objection would be well taken.

In the instant case, however, counsel for the respondent did not move against petitioner's summons, but accepted the petition, appeared generally and pleaded to the merits of the cause.

> "The decisions of this Court have uniformly been that an appearance cures any defect in the service of process; and there is nothing to distinguish this case from the general doctrine."
>
> *Farrar & Brown* v. *United States,* 3 Pet. 459, 7 L. Ed. 741.

The contention that respondent's appearance cured the defect in petitioner's procedure has been opposed by counsel for the Government upon the ground that such a finding would render the statute of limitations ineffectual. That objection is superficially so meritorious and actually so fallacious as to require special examination.

It has been the avowed intention of Legislatures and Courts alike to avoid the forfeiture of substantial rights by reason of mistakes and irregularities in judicial proceedings.

> "We are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure."
>
> *Atlantic Coast Line R. R.* v. *Burnette,* 239 U. S. 199, 60 L. Ed. 226.

Born of that intention has been the principle that failure seasonably to object to a procedural defect waives the objection. Frequently it has been provided that even a prompt and vigorous objection will not accomplish destruction of the cause of action. In the World War Veterans' Act the Congress provided that "if suit is seasonably begun but fails for defect in procedure or for other reasons

not affecting the merits, a new cause, if one lies, may be brought within a year though the period of limitation has elapsed." It has not heretofore been thought that a litigant might strengthen his position by failing to urge it. Laches does not ordinarily cause an irregularity in procedure to ripen into a jurisdictional defect. Yet that is precisely the effect respondent contends should be given its failure to quash petitioner's summons.

If respondent had moved against the original process herein and that motion had ultimately been successful, petitioner might have brought a new action either before the limitation expired or within a year after the dismissal (*Johnson* v. *United States,* 68 F. (2d) 588 (C. C. A. 9th); *Miller* v. *United States,* 13 Fed. Supp. 684 (W. D. N. Y.); 38 U. S. C. A., Sec. 445, *supra*). But respondent did not move against the summons; it allowed the matter to rest until the statute of limitations had run, and then claimed a jurisdictional defect. If there is any reason to hold that defects in process may ever be waived, the compelling force thereof is immeasurably increased when insistence upon the technicality would work a forfeiture.

> "The defendant should not be permitted to waive process and all irregularities, and, after the lapse of time sufficient probably to bar the action, avail himself of the defects in, or want of process or service."
>
> *Bentley* v. *Reid,* 133 Fed. 698 (C. C. A. 5th).

Here again the *Mill Creek* case is of importance. In its *per curiam* affirmance this Court cited *United States* v. *Larkin,* 208 U. S. 333, 52 L. Ed. 517, in which it had been held that commencing a District Court proceeding in the wrong district did not affect the jurisdiction of the Court. It has already been noted that this Court may have intended to approve the service of a summons as a method of commencing suit under the Tucker Act, or that the affirm-

ance may have meant that the bar of the statute of limitations did not destroy the District Court's jurisdiction. The only remaining interpretation of the result obtained in the *Mill Creek* case is that this Court thought the service of a summons in the action to be a defect in procedure comparable to an improper venue. It has repeatedly been held that the latter defect may be waived by counsel for the United States (*United States* v. *Hvoslef*, 237 U. S. 1; *Thames & Mersey Insurance Co.* v. *United States*, 237 U. S. 19; *United States* v. *New York & Ohio Steamship Co.*, 216 Fed. 61; *Everett Railway Co.* v. *United States*, 236 Fed. 806). It is submitted, therefore, that the *Mill Creek* case is authority directly supporting the petitioner.

Practical considerations exist which may move the Court to deny that a judicial officer of the United States has power to revive an action against the Government after the statute of limitations has barred the suit. The number of claims, justifiable and otherwise, which have been and are being made against the Government, is one such consideration; the number of judicial officers of the Government is another. It is submitted that every denial of the authority in question has been based upon such practical considerations, and that when justice is served rather than thwarted by the grant of the power, it should be found to exist. Wherever, as here, an attempt in good faith to begin suit has been made before the expiration of the time granted therefor, it should be within the authority of the Government's judicial officers to give validity to the procedure adopted.

The respondent, in its brief in opposition to the grant of certiorari herein, quoted the case of *Tucker* v. *Alexander*, 275 U. S. 228, as authority to the effect that power in Government officers to waive the statute of limitations "would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not

exist." The reason given for the conclusion arrived at is seen to be a purely practical consideration, and serves to accentuate the fact that the instant case is not one in which an antiquated claim is sought to be revived but, rather, is one in which a live and enforceable claim may be defeated by the interposition of procedural technicalities.

The case of *Tucker* v. *Alexander*, however, serves to do more than demonstrate a *ratio decidendi*. In it this Court held that Government agents may waive a claimant's failure to comply with statutory requirements, and the sentence of the opinion which was quoted in part by the respondent as above noted, expresses the distinction for which petitioner contends between the instant case and the authorities urged as controlling:

> "Such waivers if allowed would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—*consequences which do not attach to the waiver here.*"

POINT V.

The Respondent is Estopped to Deny That the Action Was Commenced by Service of the Summons.

A textbook could not more accurately define the element of equitable estoppel than does a recitation of the circumstances surrounding the commencement of this action (R. 13-16). Before the time to begin suit had expired, the attorney for the petitioner asked an Assistant United States Attorney at Buffalo how to bring an action against the United States to recover upon petitioner's War Risk policy. The Assistant District Attorney, of course, would have been justified in declining to advise petitioner's attorney. He did not do so. Knowing that petitioner would rely upon his advice, and intending that result, the Government's representative said that this action would prop-

erly be commenced by the service of a summons, in accord with the usual local practice. The petitioner did in fact rely upon that advice, and upon subsequent assurances of regularity, to his prejudice.

Much can be said of the sovereign's absolute immunity from suit, of the necessity that citizens "turn square corners when they deal with the Government" (*Rock Island R. R. Co.* v. *United States,* 254 U. S. 141, 143); but surely it was not the intent of the Congress that a claimant should be actively misled as to the requirements conditioning suit, and then denied relief for failure to perform the true conditions. It is an unusual type of agency which grants to the principal every advantage secured by the agent, in whatever manner secured, but denies the authority of the agent to bind the principal in any respect whatsoever.

> "A party may not, even innocently, mislead an opponent and then claim the benefit of his deception. A person may not rely upon a condition imposed for his benefit when failure to perform the condition is due to his own act."
>
> *Romano* v. *Metropolitan Life Ins. Co.,* 271 N. Y. 288.

Conclusion.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court reinstated, with costs.

GEORGE CLINTON, JR.,
Counsel for Petitioner.

ALGER A. WILLIAMS,
Attorney for Petitioner.
CHARLES H. KENDALL,
Of Counsel.

APPENDIX.

28 U. S. C. A., Secs. 762, 763, 765 (The Tucker Act).

762. Petition in suit against United States.—The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

763. Same; service; appearance by district attorney.—The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. Should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

765. Judgment adverse to Government in suit against United States; appeal.—When the findings of fact and the law applicable thereto have been filed in any case as provided in section 763 of this title, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.